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No. 06-407

In The

Supreme Court of the United States

MICHAEL SAVILLE,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the concept of "materially adverse employment action," as applied in claims alleging discrimination or retaliation under federal workplace legislation containing protections against retaliation, cover such adverse employment actions as constructive discharges or forced early retirements?

2. In order for an employee to establish a constructive discharge (or a forced early retirement), must the employee show an ultimate adverse employment action – namely, that the employer made working conditions so intolerable (or allowed the employee's working conditions to become so intolerable) that the employee had no choice but to quit or retire?

3. What does the concept that "context matters" mean in applying the objective standard as to whether a materially adverse employment action such as a constructive discharge or a forced early retirement has occurred?

4. Did the Tenth Circuit err in holding that Michael Saville's retirement from IBM was not a materially adverse employment action in that it was not a constructive discharge or forced early retirement but a voluntary act on his part?

PARTIES TO THE PROCEEDING'

The parties to the proceeding are:

MICHAEL SAVILLE, an individual, on behalf of himself.

INTERNATIONAL BUSINESS MACHINES CORPORATION, a corporation.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The case was not selected for publication in the Federal Reporter. The case may be cited as 2006 WL 1689265 (10th Cir. Utah 2006), 11 Wage & Hour Cases 2d (BNA) 995.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Tenth Circuit entered its judgment on June 21, 2006. Appendix A-1. Petitioner Michael Saville ("Mr. Saville") seeks review of that judgment via a petition for a writ of certiorari.

The date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari: none

The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

THE FEDERAL STATUTE(S) INVOLVED IN THE CASE

29 U.S.C. § 215:

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person –

. . . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed a complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

STATEMENT OF THE CASE

IBM employed Michael Saville from September 1966 until October 31, 1998. Mr. Saville alleged that beginning in late 1997, a series of events began which culminated in October 1998 in what he alleges constitutes a constructive discharge. Mr. Saville alleged that such series of events and constructive discharge occurred, in part or in whole, because of Mr. Saville's complaints to IBM Northern Utah management about what he, in good faith, believed were practices of his local managers regarding overtime which violated the Fair Labor Standards Act ("FLSA"). In other words, Mr. Saville alleged that IBM Northern Utah management retaliated against him for raising concerns about the legality of IBM Northern Utah office's practices regarding overtime record keeping and compensation by bringing about his forced early retirement.

On August 24, 2000, Mr. Saville filed a Complaint in the U.S. District Court, District of Utah, in Case No. 2:00CV681DB under the Fair Labor Standards Act, alleging that he had complained to IBM that IBM's practices regarding overtime record keeping and compensation violated the FLSA, that IBM had retaliated against him by bringing about his

separation from the company, and that IBM had retaliated against him because of his complaints about overtime in violation of the anti-retaliation provisions of the FLSA.

Following discovery, IBM filed a motion for summary judgment. Following extensive briefing and a hearing, the District Court granted IBM's motion for summary judgment and dismissed Mr. Saville's claim with prejudice. Appendix A-8. The District Court found that Mr. Saville had not raised a genuine issue of material fact as to whether he had engaged in protected activity under 29 U.S.C. § 215(a)(3) but even assuming he had, Mr. Saville could not raise a jury question that he had suffered adverse action by IBM.

Mr. Saville timely appealed the District Court's decision to the Court of Appeals for the Tenth Circuit. On June 21, 2006, the Tenth Circuit affirmed the District Court's decision. Appendix A-1. The Tenth Circuit focused exclusively on the issue of whether Mr. Saville had raised a triable issue of fact as to whether he suffered adverse employment action. The Tenth Circuit held that because Mr. Saville could have remained at IBM and subjected himself to a performance improvement plan, he had a free choice regarding his employment relationship and his retirement was voluntary. Accordingly, the Court held Mr. Saville had not made out a constructive discharge and was not able to show adverse action to sustain a claim of retaliation under the FLSA.

The next day, June 22, 2006, the Supreme Court announced its decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405, ___ L.Ed.2d ___ (2006).

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

1. IBM employed Mr. Saville from September 1966 until October 31, 1998, when he retired involuntarily.

2. For the last few years of his employment with IBM, Mr. Saville worked for IBM as an Account Systems Service Representative, also known as Support Specialist Customer Engineer ("CE").

3. As a Support Specialist CE, Mr. Saville had responsibility for installing and maintaining IBM hardware at customer locations, serving as a technical resource for customers, installing upgrades, implementing sophisticated system transitions, and influencing customers to purchase additional IBM products and services.

4. To successfully perform as a Support Specialist CE, one needed technical knowledge and skill and the ability to work well with customers and coworkers. Mr. Saville's technical knowledge and skills for the job were recognized as second to none. Throughout his 32-year career, Mr. Saville had worked successfully with customers and coworkers. Indeed, IBM had asked Mr. Saville to be a leader of his work group and to mentor other employees.

5. IBM Northern Utah management expected Mr. Saville to work hard, to be productive and to keep customers happy.

6. IBM Northern Utah management expected Mr. Saville to be ready at a moment's notice to install hardware and provide technical service to his customers'

hardware needs. And he was always ready to do so and did so.

7. IBM Northern Utah management also required Mr. Saville to generate revenue for the company through performing "billable services." Billable services were services above and beyond his regular job installing IBM hardware. Mr. Saville had a $100,000 a year quota for dollar amounts of billable services. This quota was twice as high as that of his peers. But he met it. IBM management had previously recognized Mr. Saville as the second highest producer of billable services in the Southwestern United States.

8. In addition to requiring Mr. Saville to install hardware for customers and to provide technical support to customers and to generate sales revenue for the company by performing billable services, IBM Northern Utah management also expected Mr. Saville to lead and mentor other employees in his group who had less expertise and experience than he had. In performing this job, Mr. Saville had to evaluate the technical performance of his peers. That evaluation invariably involved some criticism of less experienced peers when they made mistakes.

9. Mr. Saville was non-exempt from overtime compensation and was entitled to overtime pay when he worked over 40 hours a week.

10. Mr. Saville was not a perfect employee. In some of his annual performance evaluations, his managers had included comments encouraging him to work on his relationships with his peers. Mr. Saville did not always agree with the anonymous feedback he received from his managers but he worked at improving his communication and counseling skills.

11. In early 1997, Vickie Fullmer became Mr. Saville's manager. Ms. Fullmer stated that at the time she became Mr. Saville's supervisor, she had heard that although Mr. Saville was good at the technical parts of the job, he had had some difficulties with customer and peer relations.

12. In an early meeting between Ms. Fullmer and Mr. Saville, Ms. Fullmer told Mr. Saville that although he had strong technical skills, some of his peers felt that he would talk down to them and were somewhat intimidated by him. Ms. Fullmer did not mention anyone in particular. Mr. Saville could only think of one person in his group who might have such concerns. Ms. Fullmer encouraged Mr. Saville to keep working on his interactions with others "and the perception that has been created over the years."

13. In November 1997, Ms. Fullmer told Mr. Saville she was trying to change this perception of Mr. Saville that had been created over the years. "I am doing everything I can to try and help you create a new impression on the team."

14. In Mr. Saville's 1997 annual performance evaluation, Ms. Fullmer commented on the progress he had made in improving his skills at helping customers and mentoring peers. She complimented him on his customer service: "Mike did a great job in both selling and performing service contracts. . . . Mike handled a very difficult situation at IHC [a large customer] professionally and with tremendous problem management skill. His leadership, organization and technical skills were shown. He did an outstanding job and the customer is more than pleased with the results."

With respect to Mr. Saville's progress in mentoring and teamwork, Ms. Fuller wrote: "Mike worked very had this year to work through some ongoing peer perceptions. Progress was definitely made. I am proud of the work and progress and would encourage Mike to continue efforts . . . Mike is a positive contributor to the IBM Salt Lake City team and to the IBM Corporation. Thanks, Mike, for a job well done."

15. At the same time IBM Northern Utah was giving Mr. Saville so many duties and responsibilities, it was also beginning to emphasize that Customer Engineers should reduce the amount of overtime they were working.

16. In 1995, 1996 and 1997, IBM's overtime reporting system for Mr. Saville's branch office showed amounts of overtime hours that were consistent. However, as a result of IBM Northern Utah's implementation of a rule providing for no overtime over 10% of an employee's regular salary, overtime hours with some of Mr. Saville's peers dropped as much as 60% in 1998. Mr. Saville did not observe any significant reduction in workload to justify such a dramatic decrease in overtime hours. Mr. Saville came to believe that in response to IBM Northern Utah's directives limiting the amount of overtime, employees were responding by working overtime but not recording such overtime. Mr. Saville determined that the local office's crackdown on overtime was leading his peers to work overtime without recording it and without being paid for it.

17. Thus, from November 1997 forward, Mr. Saville developed concerns as to how IBM Northern Utah management was administering the overtime that he and

other Customer Engineers needed to work to service customers and meet IBM's quotas for billable services.

18. In November 1997, Mr. Saville began complaining to Ms. Fullmer, that IBM Northern Utah's emphasis on limiting overtime to a maximum of 10% of salary was causing problems in morale on his team. From November 1997 on, Mr. Saville had many verbal and e-mail discussions with Ms. Fullmer regarding the company monitoring and administering overtime.

19. In March 1998, Ms. Fullmer encouraged Mr. Saville to apply for a promotion as an ITAP Specialist, which is an exempt professional position.

20. Although Ms. Fullmer encouraged Mr. Saville to apply for the promotion, Ms. Fullmer told Mr. Saville that she did not want to lose him to a competitor.

21. One month later, Ms. Fullmer gave Mr. Saville a 4% merit raise.

22. In approximately March/April 1998, the IBM regional availability center published a "new blood" program on its website. About two months later, Ms. Fullmer received the results of IBM's anonymous employee opinion survey on his group. Shortly thereafter, Ms. Fullmer changed her attitude towards Mr. Saville and others in his group.

23. In July 1998, Ms. Fullmer gave Mr. Saville an interim performance evaluation, known as a "personal business commitment" or "PBC."

24. In July 1998, Ms. Fullmer met with Mr. Saville regarding this interim PBC. Ms. Fullmer told Mr. Saville he had a bad attitude. Mr. Saville believed that the interim

PBC was a result of Ms. Fullmer's reaction to the results of the employee opinion survey about her effectiveness as a manager. Ms. Fullmer's comments to Mr. Saville during this meeting led Mr. Saville to write a "speak up" to IBM headquarters which resulted in Mr. Saville's phone call to Pat Pye, Human Resources Managing Partner, in Dallas, Texas.

25. IBM's "speak up" program allows employees to raise issues, complaints or concerns anonymously with IBM human resources personnel.

26. Mr. Saville did not think his interim PBC was fair and, therefore, submitted an anonymous e-mail to IBM human resources under IBM's "speak up" program.

27. On July 17, 1998, Mr. Saville had a follow up telephone conference regarding his "speak up" with Human Resources Managing Partner, Pat Pye.

28. In his conversation with Pat Pye, Mr. Saville raised several concerns. One of the concerns he raised with Ms. Pye was how IBM Northern Utah's efforts to administer overtime by CEs was causing employees to work overtime but not record it ("free overtime").

29. Mr. Saville raised a concern with Ms. Pye about how fellow employees – the peers IBM was trying to have him lead and mentor – were trying to respond to IBM's efforts to control overtime. Mr. Saville expressed the concern that the local management was driving down amounts of overtime to such a low level that it was impacting customer satisfaction, creating morale problems among his coworkers and causing employees to evade the FLSA.

30. Mr. Saville mentioned to Ms. Pye that employees were working overtime but not recording such overtime.

31. Mr. Saville had other concerns which he shared with Ms. Pye. Some of these concerns had to do with his supervisor, Vickie Fullmer.

32. Throughout much of 1998, Mr. Saville had wanted to meet with Ms. Fullmer's supervisor, Brian Myers, to discuss various issues, including how IBM Northern Utah's emphasis on administering overtime by CEs was causing employees to work overtime but not record it or to engage in other practices to evade the law, but Mr. Myers would never meet with him.

33. Soon after Mr. Saville's communication to Pat Pye on July 17, 1998, Ms. Pye traveled to Phoenix, Arizona, and met with Ms. Fullmer's supervisor, Brian Myers.

34. In late August 1998, after Mr. Saville's conversation with Pat Pye and after Pat Pye's meeting with Brian Myers (Ms. Fullmer's supervisor), Brian Myers called Mr. Saville urgently, mentioning that he needed to meet with Mr. Saville as soon as possible.

35. Mr. Saville's responsibility as a Support Specialist required him to have a desk. Mr. Saville had had a desk in the IBM office in Salt Lake City since 1991. After Mr. Myers' call to Mr. Saville, Ms. Fullmer ordered Mr. Saville to vacate his desk at the IBM Salt Lake City office.

36. On September 1, 1998, Mr. Myers met with Mr. Saville at the IBM office in Salt Lake City.

37. In the meeting with Mr. Myers, Mr. Saville told Mr. Myers that the Customer Engineers he was leading and mentoring were grumbling about Ms. Fullmer's

administration of overtime because they were working overtime but not recording such overtime.

38. Mr. Saville told Mr. Myers that he did not think Ms. Fullmer was leading her group as effectively as she could and that that was why so many employees had complained about her in the employee opinion survey.

39. During this meeting, Mr. Myers also took the occasion to express his concern that Mr. Saville had reportedly been removed from a couple of customer accounts.

40. Mr. Saville explained that that was incorrect and that he had simply been trying to get a customer to perform the tasks the customer had agreed to perform in order to be able to implement a transition to a different computer system.

41. Mr. Myers told Mr. Saville that he would investigate Mr. Saville's concerns by interviewing other members of his work group.

42. Following his September 1, 1998 meeting with Mr. Saville, Mr. Myers interviewed three members of Mr. Saville's group – Bob Dalton, Murray Greaves and one other. Mr. Dalton and Mr. Greaves later told Mr. Saville they had told Mr. Myers that they appreciated Mr. Saville's mentoring and support and Mr. Dalton wrote a letter to that effect.

43. Between September 1, 1998 and September 23, 1998, Mr. Myers and Ms. Fullmer probably discussed putting Mr. Saville on a performance improvement plan or, in the alternative, offering Mr. Saville the option of leaving IBM with a severance package.

44. On or about September 23, 1998, Mr. Saville telephoned Mr. Myers. Mr. Myers told Mr. Saville he had reached a decision and he scheduled a follow up meeting with Mr. Saville for September 30, 1998 where he and Mr. Saville could talk "businessman to businessman."

45. On September 30, 1998, Mr. Myers met with Mr. Saville at the Little America Hotel café in Salt Lake City. Mr. Myers told Mr. Saville that he had talked to some of Mr. Saville's peers. Mr. Myers said that his interviews with Mr. Saville's peers had convinced him that Ms. Fullmer was not the problem. Mr. Myers said that his interviews had persuaded him that Mr. Saville was the problem. Mr. Myers told Mr. Saville that his attitude, support for Ms. Fullmer, leadership and mentoring were unacceptable and that his attitude problem was causing customers to complain.

46. Mr. Saville stated that management's actions and lack of actions were influencing his attitude and that of the group he was supposed to be leading. Mr. Saville mentioned several issues that were influencing his attitude and the attitude of his peers.

47. Mr. Myers told Mr. Saville that he wanted Mr. Saville "out of IBM." Mr. Myers said he needed to "fix this" right away. Mr. Myers said, "I want you to leave IBM. Well, you can accept the [performance improvement plan.]"

48. Mr. Myers told Mr. Saville that he would have the option of going on a 90-day performance improvement plan or leaving IBM involuntarily with a severance package.

49. Mr. Myers did not have any of the details of the performance improvement plan, other than that the duration of the performance plan would be 90 days. Mr. Myers told Mr. Saville that Ms. Fullmer would provide him with details regarding the plan. When Mr. Saville offered explanations as to his concerns, Mr. Myers told Mr. Saville "it ain't a perfect world," and was not interested in hearing anything else Mr. Saville had to say. Mr. Saville left the meeting feeling as though Mr. Myers had fired him.

50. On October 5, 1998, Mr. Saville met with Ms. Fullmer. She told him that he had had problems with his support of his management, customer satisfaction, leadership and mentoring. She told him she could put him on a 30-day improvement plan, instead of 90 days, to correct his problems or he could leave IBM.

51. Ms. Fullmer explained that the period of the improvement plan would not be 90 days, as Mr. Myers had stated it would be, but would be shortened to only 30 days.

52. Despite Mr. Saville's requests, Ms. Fullmer avoided giving Mr. Saville any specifics, especially written specifics, as to the content of the performance improvement plan. Ms. Fullmer would not provide any objective criteria by which she was going to measure Mr. Saville's performance. Ms. Fullmer did tell Mr. Saville that if he chose to go on the plan and she received one phone call that she deemed to be a complaint against Mr. Saville, she would deem him to have failed the performance improvement plan, he would have no opportunity to defend himself against such anonymous incident and he would be discharged.

53. Mr. Saville's experience as an IBM manager and employee led him to believe that without a written, specific improvement plan in place, employees rarely succeeded in remaining employed with IBM.

54. Mr. Saville decided the option of working another 30 days, without any written plan in place, without any specifics or objective criteria, with an arrangement which could be ended at any time by phantom, anonymous feedback, was not in his best interests and he decided to leave IBM involuntarily.

55. On October 30, 1998, Mr. Saville retired pursuant to an involuntary retirement code.

56. Soon thereafter, Ms. Fullmer left her position as Customer Services Manager. On November 17, 1998, Mr. Saville received a telephone call from one of his peers, Ron Omori, who informed Mr. Saville that Ms. Fullmer was no longer a manager.

BASIS FOR FEDERAL JURISDICTION

The court of first instance had jurisdiction under 28 U.S.C. § 1331.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

ARGUMENT

A. The Supreme Court Should Decide that the Concept of "Materially Adverse Employment Actions" Covers Such Adverse Employment Actions as a Constructive Discharge or a Forced Early Retirement.

The instant case involves an intersection between two recent Supreme Court cases, *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405, ___ L.Ed.2d ____ (2006) and *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004).

In *Burlington Northern & Santa Fe Railway Co.*, the Supreme Court sought to resolve a conflict between the Courts of Appeals as to how adverse an employment action has to be before it can be considered an "adverse employment action" which can serve as the basis for a claim of discrimination or retaliation as provided for in federal workplace statutes and whether the adverse action being challenged has to be workplace or employment related in order to be actionable. The Supreme Court resolved the conflict by holding that a plaintiff in a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), alleging discrimination or retaliation must show that a reasonable employee would have found the adverse action being challenged to be "materially adverse." The Court defined the phrase "materially adverse" as an action which causes an injury or harm. It distinguished materially adverse employment actions from trivial harms such as petty slights or minor annoyances, but also clarified that a critical mass amounting to material adverseness could develop before an employer took an ultimate employment action such as termination. The Court also decided that

application of Title VII's retaliation provisions is not limited to employer actions that occur at the workplace. The Court also reinforced the rule that whether any adverse employment action is "materially adverse" must be based on an objective standard – that of a reasonable employee in the plaintiff's position. Finally, the Court also established that whether an adverse action is materially adverse may depend not merely on the adverse action's effect on the individual employee bringing the claim, but on whether such adverse action would dissuade a reasonable worker from making or supporting a charge of discrimination (or retaliation) or deter victims of discrimination (or retaliation) from coming forward and complaining:

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination. (126 S.Ct. 2405 at 2416.)

Presumably, the Court's ruling in *Burlington Northern and Santa Fe Railway Co. v. White* applies to claims of discrimination or retaliation under all federal workplace statutes which encourage protected activity and prohibit employer retaliation against employees engaging in protected activity. Such statutes would include not only Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a), but the Age Discrimination in Employment Act, see specifically 29 U.S.C. § 623(d), the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., the Family and Medical Leave Act, 29 U.S.C. § 2601 et. seq., and the statute which preceded all of such recently

enacted workplace laws, the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

No doubt because of the fact intensive nature of the inquiry as to whether any given adverse employment action constitutes a materially adverse employment action, the Supreme Court did not attempt to list or describe all adverse actions which could be deemed to be materially adverse employment actions. Thus, there is an open question as to whether the universe of materially adverse employment actions includes constructive discharges and forced retirements. Because a constructive discharge or a forced retirement would typically involve significant harm in the form of a loss of wages and benefits, it is likely that such adverse actions would qualify as a materially adverse employment actions within the contemplation of the federal workplace anti-retaliation statutes. The Supreme Court should clarify that a true constructive discharge or forced retirement would certainly qualify as a materially adverse employment action.

B. In Order for an Employee to Establish a Constructive Discharge, Must the Employee Show that the Employer Made Working Conditions so Intolerable that the Employee Had No Choice But to Leave or Retire?

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court rejected the notion that adverse employment actions are only materially adverse, and, thus, actionable, if they are ultimate employment actions. The Supreme Court held that adverseness can reach a critical mass of being materially adverse well before an employer takes an ultimate or final action such as suspending, demoting or terminating an employee. In this

respect, the Court's decision in *Burlington Northern* is similar to the Supreme Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), in which the Supreme Court held that employer liability for hostile work environment harassment or discrimination may attach well before an employee develops permanent psychological damage.

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004), the Supreme Court expressly recognized that Title VII provides a basis for an employee to hold an employer liable for a true constructive discharge. In *Suders*, however, the Supreme Court held that for a set of facts to qualify as a constructive discharge, it must be tantamount to an ultimate employment action providing an employee only one choice: resign or be fired. The Court also held that the inquiry of whether an employee has experienced a constructive discharge is an objective one. Did an employer make working conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign? As a result, there is a potential for confusion. In order to establish "materially adverse employment action," an employee need not establish an ultimate employment action, but in order to establish a constructive discharge, an employee has to establish an ultimate employment action. There is also a potential for confusion in that under *Harris v. Forklift Systems*, supra., employer liability for harassment or discrimination (or retaliation) may attach well before an employee develops permanent psychological damage, but under *Suders*, supra., an employee cannot make out a case for constructive discharge unless the employee proves that the employer has made working conditions so intolerable that a reasonable employee would

feel constrained to resign. This means that an employee must tolerate actions which may cause serious psychological damages until they become intolerable. The Supreme Court should clarify this situation.

The Circuits had not been entirely consistent in framing the test of what sets of facts might constitute a constructive discharge. Compare *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7 (1st Cir. 2002) (plaintiff has to show that working conditions were "so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign," *Id.* at 28), and *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163 (3rd Cir. 2001) (framing the issue as: would a reasonable jury find that the employer permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign, *Id.* at 167), with *Wolf v. Northwest Indiana Symphony*, 250 F.3d 1136 (7th Cir. 2001), cert. denied, 534 U.S. 1028 (2001) (situation must be so extreme that a resignation is the only alternative to avoiding or overcoming an intolerable situation), *Campos v. City of Blue Springs*, 289 F.3d 546 (8th Cir. 2002) (employer must deliberately make or allow the plaintiff's working conditions to become so intolerable that the plaintiff has no choice but to resign) and *Garrett v. Hewlett Packard Co.*, 305 F.3d 1210 (10th Cir. 2002) (plaintiff must establish that he had no other choice but to quit, *Id.* at 1221).

Consequently, the Courts of Appeals had difficulty in reaching consistent results. For example, in *Agnew v. BASF Corp.*, 286 F.3d 307 (6th Cir. 2002), the Sixth Circuit held that criticism in performance reviews and institution of performance plans *alone*, did not constitute objectively intolerable conditions, *Id.* at 310, and in *Garrett v. Hewlett Packard Co.*, 305 F.3d 1210 (10th Cir. 2002), the Tenth

Circuit held that an extended period of intimidating behavior by supervisors which resulted in lowered performance evaluations and repeated denials of requests to transfer might be viewed as materially adverse employment actions but if the employee believed the employer was setting him up to fail so as to be able to terminate him but he resigned before the employer had finished the process, he didn't have enough to make out a constructive discharge and loses at summary judgment.

In *Suders*, supra, the Supreme Court expressly recognized that an employer could be liable under Title VII for a constructive discharge and sought to standardize the test but in doing so, articulated a test that seems to be very difficult to satisfy.

In practice, employees making claims of constructive discharge rarely succeed. The test of showing that working conditions have become so intolerable that an employee has no alternative but to resign is so high that the employer rarely prevails. An employer can always argue the employee could have remained working or that a termination was never inevitable. *Cuevas v. Monroe Street City Club, Inc.*, 752 F.Supp. 1405 (N.D. Ill. 1990). But in order to satisfy the standard for constructive discharge do materially adverse employment actions need to rise (or stoop) to the level of being a substantial demotion, see *Wolff v. Automobile Club of Michigan*, 194 Mich.App. 6, 486 N.W.2d 75, 80 (1992), or take the form of threats of inflicting serious bodily harm on the complaining employee, see *Ford v. Alfaro*, 785 F.2d 835 (9th Cir. 1986), or rape by a supervisor, see *Champion v. Nationwide Security, Inc.*, 450 Mich. 702, 545 N.W.2d 596, 600 (1996)?

The Supreme Court should clarify whether an employee seeking to establish a constructive discharge as a form of retaliation has to prove what amounts to an ultimate employment action.

The key to such clarification may lie in harmonizing the tension between an objective standard and a process that can give due consideration to the concept that "context matters."

C. The Supreme Court Should Clarify What the Concept that "Context Matters" Means in Applying the Objective Standard as to Whether the Facts of a Given Situation Have Created a Materially Adverse Employment Action Such as a Constructive Discharge or Forced Retirement.

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court reinforced the concept that an objective standard is judicially administrable. However, the Court also emphasized that in determining whether an adverse employment action is materially adverse "context matters." The Court gave the example of how changing an employee's work schedule might make little difference to some workers but have a significantly adverse effect on a young mother with school age children. Thus, there is some tension between a need for an objective standard and a process that takes into account such heavily subjective factors as "context."

Presumably, context also matters in determining whether a given set of facts creates a constructive discharge.

But the Courts of Appeals have treated the concept of "context" differently. For instance, in *Johnson v. Nordstrom, Inc.*, 260 F.3d 727 (7th Cir. 2001), cert. denied, 535 U.S. 928 (2002), the Seventh Circuit held that an African American sales employee in a department store who filed a charge of discrimination after being non-selected for two promotions she sought and who alleged that thereafter management assigned her menial work, wrongfully accused her of stealing customers from her coworkers, gave sales deals to other coworkers and monitored her activity on the sales floor, didn't allege actions egregious enough to establish working conditions so intolerable that a reasonable person would have been compelled to resign. See also *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163 (3rd Cir. 2001) (allegations of a continuous pattern discriminatory treatment, although stressful and frustrating, was not so intolerable as to compel a reasonable person to resign, summary judgment affirmed). But in *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7 (1st Cir. 2002), the First Circuit examined a long history of hostility by a supervisor towards an employee and frequent complaints by the employee and held that because the employee reasonably believed that the working conditions at the employer would not change and that she could anticipate more of the same in the future and that if she wanted to avoid future harm, she would need to leave work entirely, she made out a claim of constructive discharge and affirmed a jury's verdict in her favor. Accord, *Fitzgerald v. Henderson*, 251 F.3d 345 (2nd Cir. 2001), cert. denied, 536 U.S. 922 (2002) (although a final straw incident could not in and of itself be viewed as a constructive discharge, a jury could find that the cumulative effect of unfair criticism, especially if its severity was escalating, might convince a reasonable person on the day of a final meeting

that working conditions were so intolerable that resignation was the only realistic option.

The Supreme Court should clarify what the heavily subjective concept of "context matters" means in applying an objective standard to the issue of whether a given set of facts constitutes a constructive discharge.

D. In the Instant Case, the Tenth Circuit Did Not Pay Sufficient Attention to Context in Determining Whether IBM Constructively Discharged Mr. Saville.

Context does matter in cases involving claims of retaliation and especially in cases involving claims of constructive discharge. One area where context should matter a great deal is where an employee has worked a long time for one employer, has become very familiar with a company's methods of operation, customs and practices, and alleges a constructive discharge. For example, in the somewhat intriguingly named case of *Ford v. General Motors Corp.*, 305 F.3d 545 (6th Cir. 2002), the Sixth Circuit did give serious weight to context. In *Ford*, the plaintiff had worked for the defendant for more than 30 years. The company had placed the plaintiff in a new position but plaintiff contended he was not being given enough time to perform all of the tasks he was supposed to perform in his new position. The plaintiff claimed that when he asked for a reduction in his workload, management refused and sent supervisors to watch him to see if he would make a mistake or find some other reason to terminate him. The plaintiff came to believe the company's action towards him must be calculated to set him up to fail so that the company could terminate him and he resigned. The Sixth Circuit noted that the plaintiff had successfully

performed a variety of jobs at General Motors for more than 30 years and, based on his familiarity with his employer, found that the plaintiff's evidence that the company must have been setting him up to fail was enough to overcome the employer's motion for summary judgment on the plaintiff's claim of constructive discharge.

As to the issue of the employer's intent, the Sixth Circuit found that although the plaintiff had not offered any evidence to prove that the company intended the impact of its conduct on the plaintiff, the employer should be deemed to have constructively intended its conduct because it should have reasonably foreseen that its conduct would lead the plaintiff to resign rather than risking imminent termination jeopardizing his pension.

In *Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001), the Sixth Circuit addressed context by examining the culture of waitressing at a restaurant and reversed the trial court's granting of the employer's motion for summary judgment. Accord, *Tadlock v. Powell*, 291 F.3d 541 (8th Cir. 2002), in which the Eighth Circuit discussed context by analyzing the scenario of a long-term employee in a white-collar environment, affirming a jury verdict in favor of the employee. See also *Hunt v. Missouri Dept. of Corrections*, 297 F.3d 735 (8th Cir. 2002), in which the Eighth Circuit discussed the context of nursing and found that additional and unnecessary job requirements, efforts to obstruct their work, and lack of response to their complaints about how they were being treated by coworkers, among other employer actions and inactions, was sufficient to justify affirming a verdict finding two nurses had been constructively discharged.

In adjudicating the instant case, context mattered a great deal. But the Court of Appeals for the Tenth Circuit did not give sufficient weight to the context of Mr. Saville's lengthy employment with IBM, his observations of how IBM dealt with employees it considered to be "problem employees," and his reasonable expectations of what IBM would do to him.

Mr. Saville had worked for IBM for 32 years. For many of those years, he had worked as a manager. He had placed employees on performance improvement plans and had seen what happened. He was familiar with IBM's culture and way of dealing with employees. His experience at IBM and his familiarity with how IBM did things convinced him that when things started happening to him, he was in the company's "gun sights." If the Tenth Circuit had focused more carefully on the context of Mr. Saville's history with IBM, it would have determined that a reasonable person in Mr. Saville's place would have felt that the option given to him to continue working subject to a very short and amorphous corrective action plan was so illusory that a reasonable person in his situation would have felt that his only realistic option was to retire. Had the Tenth Circuit given appropriate weight to the context of Mr. Saville's circumstances and reasonable expectations, the Tenth Circuit would have found that IBM's option of placing Mr. Saville on an ill-defined performance improvement plan was not a real option, but just postponing an inevitable termination and, thus, both a materially adverse employment action and a constructive discharge.

Review of the Tenth Circuit's decision through a writ of certiorari would enable the Supreme Court to: (1) clarify the different levels of adverseness necessary to establish a materially adverse employment action and a constructive

discharge; (2) clarify whether an employee seeking to establish a constructive discharge must establish the equivalent of an ultimate employment action; and (3) amplify what "context means" in the task of adjudicating claims of retaliation and constructive discharge under an objective standard.

Respectfully submitted,

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(*Counsel of Record*)

Attorney for Petitioner Michael Saville

September 19, 2006

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL SAVILLE,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

No. 05-4058
(D.C. No. 2:00-CV-681-DB)
(D. Utah)

ORDER AND JUDGMENT*

(Filed June 21, 2006)

Before **HENRY, BRISCOE,** and **MURPHY,** Circuit Judges.

Plaintiff-Appellant Michael Saville appeals from a summary judgment in his case for retaliatory constructive

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

discharge in violation of the Fair Labor Standards Act (FLSA). We affirm.

BACKGROUND

Saville worked for International Business Machines Corporation (IBM) as a senior customer engineer. He was "primarily responsible for the post sale maintenance of IBM equipment in customer accounts," which required that he provide "technical assistance and advice to less experienced personnel" and "develop[] positive relationships with customer management and staff." Aplt. App. at 275. "Saville was not a perfect employee," however, as he had problems mentoring and communicating with his peers. Aplt. Br. at 8.

In 1997, Vickie Fullmer became Saville's supervisor. Toward the end of the year, Saville began voicing his concerns that IBM's "crackdown on overtime was leading his peers to work overtime without recording it and without being paid for it," creating a morale problem. *Id.* at 11; *see also* Aplt. App. at 75A. In July 1998, Fullmer met with Saville for an interim performance evaluation after some of Saville's peers complained that he was difficult to work with and a customer complained of disparaging treatment. Aplt. App. at 142-43, 205. During the meeting, Fullmer revealed some of the complaints and accused Saville of having a "bad attitude." *Id.* at 88-89. Afterward, Saville submitted a "Speak Up" e-mail to IBM's human resources department, accusing Fullmer of "dropping my performance" rating because Saville's group had criticized her leadership in a survey. Aplee. Supp. App. at 192; *see also* Aplt. Br. at 13. In the e-mail, Saville admitted, "I think I do have an attitude problem as a result of some of

my manager's action and lack of action. . . ." Aplee. Supp. App. at 192.

In September 1998, Saville met with Fullmer's supervisor, Brian Myers, and told him that some customer engineers were "grumbling about working overtime and not recording it and getting paid for it because of how it's being micro-managed." Aplt. App. at 106. Saville further complained that Fullmer's leadership negatively affected morale. Following an investigation, Myers told Saville that "his attitude, leadership, mentoring and support for Ms. Fullmer were unacceptable and that his attitude problem was causing customer complaints." *Id.* at 149. Saville was given the option of being placed on a performance improvement plan or retiring from IBM with a severance package.

During an October 5, 1998 meeting, Fullmer told Saville that the improvement plan would be thirty days long, *id.* at 121, that it would gage performance, leadership, peer support, management support, teamwork and customer satisfaction, *id.* at 123, and that if she received one complaint he would fail the plan and be fired, *id.* at 121. Saville was given thirty days to decide which option to choose. *Id.* at 123. On October 30, 1998, Saville notified IBM that he chose retirement, effective the next day.

In August 2000, Saville sued IBM under the FLSA, alleging that he was constructively discharged for "voic[ing] his concerns regarding IBM's practices in recording and paying overtime." *Id.* at 13. The district court granted IBM summary judgment, ruling, among other things, that Saville suffered no adverse employment action. Saville appeals.

DISCUSSION

I. Summary Judgment Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is not "genuine," and summary judgment will be warranted, if no reasonable jury viewing the evidence could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We review "a grant of summary judgment de novo with an examination of the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005).

II. The FLSA

Among other things, the FLSA prohibits employers from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint . . . under or related to [the FLSA]." 29 U.S.C. § 215(a)(3). This "section protects conduct based on a good faith, although unproven, belief that the employer's conduct is illegal," and "applies to the unofficial assertion of rights through complaints at work." *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984).

We analyze FLSA-retaliation claims under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004). Under that

framework, the employee must first establish a prima facie case of retaliation. *Id.* If the employee succeeds, the employer must offer a legitimate, non-retaliatory reason for the adverse employment action. *Id.* Then, "the burden shifts back to the employee to show [that] genuine issues of material fact exist regarding whether the employer's proffered reason is unworthy of credence." *Id.* at 1207. We conclude that Saville's retaliation case fails at the framework's initial stage.

An employee cannot establish a prima facie case of retaliation without an adverse employment action. *See id.* at 1206. Saville's retirement from IBM would qualify as an adverse action only if IBM deliberately made or allowed Saville's working conditions to become so intolerable that he had no other choice but to retire. *See MacKenzie v. City & County of Denver,* 414 F.3d 1266, 1281 (10th Cir. 2005). In other words, Saville's retirement would have to amount to a constructive discharge, and would depend upon whether a reasonable person would view the conditions at IBM as intolerable, not upon Saville's subjective view of those conditions. *Id.*

Saville argues that a triable issue of fact exists as to whether a reasonable person would have chosen retirement over the performance improvement plan, because (1) he had received a negative interim evaluation; (2) his complaints against Fullmer were not seriously considered, and instead, he was accused of being the problem; (3) Myers told him, during their September 1998 meeting, "I want you out" of IBM, Aplt. App. at 118 (quotation omitted);[1] and (4)

[1] Saville ignores the full extent of Myers' remarks. At his deposition, Saville testified that Myers said, " 'I want you to leave IBM. Well, you can accept the [performance improvement plan].' " Aplt. App. at

(Continued on following page)

Myers said the duration of the improvement plan would be ninety days, but Fullmer shortened it to thirty days, "did not put anything on paper," and said one complaint would result in termination, Aplt. Br. at 39.[2] We agree with the district court that no reasonable jury could find these conditions so intolerable as to render Saville's retirement involuntary. The inquiry is not whether the conditions at IBM were "difficult or unpleasant," but whether, at the time of Saville's retirement, IBM did not allow him "the opportunity to make a free choice regarding his employment relationship." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir. 2004) (quotation omitted). Other courts have held "that criticism in performance reviews and institution of performance improvement plans, alone, do not constitute objectively intolerable conditions." *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002); *accord Givens v. Cingular Wireless*, 396 F.3d 998, 998 (8th Cir. 2005). We agree. *Cf. Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1339 (10th Cir. 2000) (placing employee on a professional development plan and requiring employee to meet weekly with her superior was not an adverse employment action in her First Amendment retaliation case). Furthermore, we have

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118. In any event, an employer's subjective intentions regarding the employee have no bearing on whether there was a constructive discharge. *Baca v. Sklar*, 398 F.3d 1210, 1216 (10th Cir. 2005).

[2] Saville also states that Fullmer and Myers "transformed [a] customer's failure [to perform its obligations] into a customer complaint against Mr. Saville." Aplt. Br. at 38. But Saville fails to cite any part of the record showing such a transformation. Indeed, the customer submitted an affidavit testifying that it had asked IBM to remove Saville from a project because he "was obnoxious and acted inappropriately" and "was not treating us properly and with respect." Aplt. App. at 205.

previously indicated that an employer's offer of an alternative to quitting is not consistent with constructive discharge. *See, e.g., Exum,* 389 F.3d at 1136. Saville could have remained at IBM and undertaken the performance improvement plan. Indeed, Saville testified at deposition that he had placed at least six subordinates on ninety-day improvement plans and they all succeeded, although some "fell off" afterward. Aplt. App. at 127.[3] Finally, Saville was given thirty days in which to consider remaining with IBM and was verbally notified of the criteria under which he would be judged if he elected to remain. The totality of the circumstances indicates, as a matter of law, that Saville's retirement was voluntary.

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

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[3] We are not persuaded by Saville's summary contention that a thirty-day plan is somehow more onerous than a ninety-day plan. Nor do we attribute any weight to Saville's assertion that, if he had chosen the improvement plan, he would have remained subject to termination "a year or more after the successful completion of the plan" if he violated any of the plan's criteria, Aplt. Br. at 35. Mere speculation is insufficient to withstand summary judgment. *Setliff v. Mem'l Hosp. of Sheridan County,* 850 F.2d 1384, 1393 (10th Cir. 1988); *see also Agnew,* 286 F.3d at 310 ("An employee who quits a job in apprehension that conditions may deteriorate later is not constructively discharged. Instead, the employee is obliged not to assume the worst, and not to jump to conclusions too fast." (quotation omitted)).

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

MICHAEL SAVILLE, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	**ORDER & OPINION** (Filed Feb. 24, 2005) Case No. 2:00-cv-681 Judge Dee Benson

Plaintiff Michael Saville ("Saville") alleges unlawful retaliation in violation of the Fair Labor Standards Act ("FLSA") against Defendant International Business Machine ("IBM"). Before the Court is Defendant's Motion for Summary Judgment. Having considered the parties' arguments, briefs, and the relevant law, the Defendant's motion is GRANTED for the reasons set forth below.

BACKGROUND

Saville was employed by IBM from the mid-1960s until October 31, 1998. Saville was an Account Systems Services Representative, also known as a Customer Engineer ("CE"), from 1996 through 1998. IBM had different levels or "Bands" of CEs based on an employee's level of experience and responsibility. Saville was a Band 5 CE, the second highest level, and the most senior in his group. As a CE, Saville was responsible for maintaining IBM equipment at customer locations, serving as a technical resource for customers, managing customer accounts in a cost-efficient manner, and influencing customers to

purchase additional IBM products and services. The three essential functions of Saville's job were: (1) installing and maintaining IBM equipment for customers; (2) developing positive relationships with customer management and staff to ensure a high level of overall customer satisfaction in all assigned accounts; and (3) mentoring and training less experienced CEs.

In 1995, Saville's managers began to note problems with the manner in which he interacted with customers, management, and peers. In Saville's annual performance review (known as a "Personal Business Commitment" or "PBC"), he received the lowest of three possible ratings – "More is expected."[1] Saville's problems in mentoring and relating to his peers continued in 1996, as reflected in his PBC: "Mike . . . has had a hard time to mentor [sic] others because a lot of them prefers [sic] not to work with him . . . Mike should continue to work on his relationships with his peers." Despite these problems, however, Saville received the second highest rating in his 1996 PBC – "Achieved commitments."

In January, 1997, Vickie Fullmer ("Fullmer") became Saville's supervisor. During her first year supervising Saville, Saville performed well technically, but continued to have problems, with his peer relationships. As part of the annual PBC, IBM solicited comments from each employee's peers in "360 Degree Feedback." Saville's peers made positive comments about his technical ability, but

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[1] Jim Fawver, Saville's manager, stated, "more is expected in his relationships and the way he communicates with others. This has lead [sic] some people to not want to use him in his specialist capacity or as a peer. Mike at times comes across negative and adversarial causing some people to not want to deal with him."

some negative comments regarding his relations with them and with customers.[2] Fullmer rated Saville as having "Achieved commitments" on his 1997 PBC because she had seen some improvement in his team building, customer relations, mentoring, and interpersonal skills, and because he had valuable technical abilities.

In late 1997 and early 1998, Saville and Fullmer had ongoing e-mail discussions regarding IBM's goal of reducing the amount of overtime worked by CEs to control rising costs. Saville expressed his frustrations with IBM's overtime policy, namely that it was difficult for him and other CEs to fulfill their job requirements without incurring overtime. Saville did not state that he thought IBM was violating overtime laws in these e-mail discussions. Fullmer responded to Saville's concerns by telling him to record his overtime correctly and accurately.

According to Fullmer, Saville's problems with interpersonal relations and mentoring did not improve in 1998, and in fact, became worse. In June, Fullmer received a complaint from Orem City, one of Saville's customers.

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[2] Saville's peers made the following comments:

"I know Mike is trying harder to have better 'bedside manners' and I think he will accomplish the task. His customer relations is [sic] sometimes strained because of what he says. Mike has this problem with his peers too . . . "

"Mike is great to work with and I appreciate his skills as wells [sic] as his candor in approaching a problem. A possible point for improvement might be for Mike to be a little less forceful when working with customers when he tries to have them understand his approach with certain projects . . . "

"Mike works to [sic] many hours and it makes him grouchy." *See* IBM Ex. H.

Orem City requested that Saville be taken off the account because he was "obnoxious and acted inappropriately" in his dealings with Orem City employees working on a systems upgrade. Saville claims that he was replaced on the Orem City account because he did not have the requisite skills to perform the task requested by the customer. Saville also testified that during this time period, he was disappointed he did not receive a promotion and was unhappy due to a lack of communication with Fullmer and other management personnel.

Because Fullmer thought that Saville's performance was headed in the wrong direction and was unacceptable, she decided to give him an interim PBC review. IBM uses interim reviews to tell employees that they are trending toward a potential lowering of their performance rating with the hope that they will correct their performance before the annual review. Fullmer met with Saville in July 1998 to discuss her concerns and tell him that he was being reviewed on an interim basis. She told him that his performance rating was heading downward and was a whole level below what he had been rated in 1997. Fullmer testified that she made this assessment based on Saville's negative attitude, lack of leadership, and continued problems dealing with his peers and customers.

Saville did not think his interim PBC was fair, and, therefore, submitted an anonymous complaint to IBM human resources through IBM's Speak Up program, which allows employees to raise issues, complaints, or concerns anonymously with human resources personnel. In his complaint, Saville stated that he believed the interim PBC was a result of Fullmer's reaction to a negative Employee Opinion Survey about her effectiveness as a manager. On July 17, 1998, Saville had a telephone conference

regarding his Speak Up with Pat Pye ("Pye"), an IBM Human Resources officer. Pye suggested that Saville discuss his concerns with Brian Myers ("Myers"), his Second Line Manager.

On September 1, 1998, Saville met with Myers to discuss his concerns. Saville stated that he thought the interim review was unfair and that Fullmer was reacting to what he believed to be negative feedback on an employee opinion survey. Saville stated he thought Fullmer was an ineffective leader and his group's morale was down as a consequence. Saville also testified that he voiced his concern about how IBM's overtime directives were forcing CEs to work and not report overtime. Following the meeting, Myers investigated Saville's concerns by interviewing other members of his group. Myers concluded that Saville's concerns were without merit, and instead, that Saville had serious communication problems with Fullmer and other customer engineers.

Fullmer continued to see problems with Saville's performance following the interim PBC. In late September 1998, she met with Myers to tell him she had decided to put Saville on a formal performance improvement plan[3] Myers also suggested offering Saville the alternative option of a severance package, and Fullmer agreed that this would be a suitable alternative offer.

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[3] Both Fullmer and Myers testified that placing an employee on a performance improvement plan does not mean that the employee is automatically going to be terminated. Rather, it is a real opportunity for the employee to correct deficient performance. Myers also testified that he has had experience with other IBM employees who successfully completed improvement plans.

Myers met with Saville on September 30, 1998. Myers told Saville that his interviews with Saville's peers had not confirmed Saville's claim that Fullmer was the problem. Rather, the interviews had revealed that Saville had serious performance problems. Myers also told Saville that his attitude, leadership, mentoring, and support of Fullmer were unacceptable and that his attitude was causing customer complaints. Saville responded, in part, by admitting that he had a negative attitude, but blamed it on how he felt he had been treated by management. Myers explained to Saville that he needed to make an effort to turn things around and that changes had to be made immediately. Myers told Saville that he would have the option of going on a ninety-day performance improvement plan or leaving IBM with a severance package. Myers concluded the conversation by stating that Fullmer would provide further details regarding the two options.

On October 5, 1998, Fullmer met with Saville and explained the two options in more detail. She told him that he had fallen short of his job expectations and could go on a thirty-day performance improvement plan[4] to correct his problems, or, alternatively, he could leave IBM and accept a severance package. Fullmer told Saville that he had thirty days to make a decision. Later that month, Saville rejected both options presented by Fullmer. Instead, he told Fullmer that he had decided to retire from IBM. Specifically, he rejected the IBM "Individual Enhanced Separation Allowance" and chose "Separation: Individual

[4] According to Saville, Myers told Saville that the performance improvement plan would be ninety days, and then Fullmer shorted the time period to thirty days.

Separation/Retirement Reasons – Management Initiated."[5] On August 24, 2000, Saville brought suit against IBM, alleging unlawful retaliation in violation of the FLSA.

DISCUSSION

After viewing the evidence and drawing all reasonable inferences in the light most favorable to Saville, the Court finds that Saville has failed to demonstrate a genuine issue of material fact in his allegations that IBM violated the FLSA through its employment decisions. Therefore, summary judgment is appropriate. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991). The moving party need not negate the nonmoving party's claims, but need only point out that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For purposes of this motion, the Court construes all facts and reasonable inferences in the light most favorable to plaintiff. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v.*

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[5] The corresponding Human Resources code is as follows: "8J – No Payment – Involuntary Separation (Permitted to Retire) – Inability meet IBM Standards of Job Performance."

Southwestern Bell Tel. Co., 925 F.2d 1288, 1292 (10th Cir. 1991).

Retaliation in Violation of the FLSA

Saville's sole claim against IBM is for retaliation under the FLSA. The FLSA prohibits any person from retaliating against an employee for asserting his rights under the Act. Specifically, the FLSA makes it unlawful for an employer

> [t]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). The Tenth Circuit applies a "motivating factor" analysis to claims of retaliatory discharge: "When the 'immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under § 215(a)(3) whether or not other grounds for discharge exist.' If retaliation is not the motivating factor, then the discharge is not unlawful."[6] *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996) (quoting *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992)).

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[6] The Tenth Circuit has held that the "motivating factor" test is equivalent to a "but for" test; a discharge is unlawful under § 215(a)(3) " 'only if would have occurred *but for* the retaliatory intent.' " *McKenzie v. Renberg 's Inc.*, 94 F.3d 1478, 1483 (10th Cir. 1996) (quoting *Martin*, 977 F.2d at 1408 n.4)) (emphasis in original).

FLSA retaliation claims are analyzed under a three-pronged test initially articulated in *McDonnell Douglas Corp. v. Green,* 441 U.S. 792 (1973). *Richmond v. ONEOK, Inc.,* 120 F.3d 205, 208 (10th Cir. 1997) (citing *Morgan v. Hilti, Inc.,* 108 F.3d 1319, 1323 (10th Cir. 1997)). Under this analysis, a plaintiff must first establish a prima facie case of retaliation. *Id.* The burden then shifts to the employer to offer a legitimate reason for the plaintiff's termination. *Id.* Then the burden "shifts back to the plaintiff to show that 'there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual.'" *Id.* (quoting *Morgan,* 108 F.3d at 1323).

To establish a prima facie case of retaliation, Saville must demonstrate that (1) he engaged in activity protected by the FLSA; (2) he suffered adverse action by IBM subsequent to or contemporaneous with such employee activity; and (3) a causal connection existed between Saville's activity and IBM's adverse action. *Conner v. Schnuck Markets, Inc.,* 121 F.3d 1390, 1394 (10th Cir. 1997).

1. Protected Activity

First, Saville must show that he engaged in activity protected by the FLSA. *Id.* Although § 215(a)(3) specifically lists the types of activities which are protected from retaliation, the Tenth Circuit has held that it also protects employees who articulate a good faith belief that the employer is violating their rights under the ELSA. *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984). Moreover, the provision "applies to the unofficial assertion of rights through complaints at work." *Id.*

Saville alleges he was engaged in protected activity when he made complaints to management[7] that IBM's directive to reduce overtime was resulting in employees working overtime but not recording the hours, and thus, not being paid for overtime. IBM avers that Saville can only show that he disagreed with IBM's company policy regarding overtime, and this is not sufficient to assert his statutory rights under the FLSA. The Court agrees with IBM. The Tenth Circuit has stated, "we have never held that an employee is insulated from retaliation for participating in activities which are neither adverse to the company nor supportive of adverse rights under the statute which are asserted against the company." *McKenzie,* 94 F.3d at 1486. In order to be protected under § 215(a)(3), an employee is required to make a "'good faith *assertion* of [one's] statutory rights." *Id.* (quoting *Love,* 738 F.2d at 387) (emphasis and alteration in original). In other words, "it is the assertion of statutory rights (i.e., the *advocacy* of rights) by taking some action adverse to the company – whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise – that is the hallmark of protected activity under § 215(a)(3)." *McKenzie,* 94 F.3d at 1486 (emphasis in original).

In the instant case, Saville merely complained about IBM's company overtime policy and how it was forcing CEs to work and not report overtime. Saville never *asserted* a

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[7] Saville alleges that he made these overtime-related complaints to Fullmer, Pye and Myers. IBM claims that Saville has introduced no evidence that he made any such complaints to Fullmer. Viewing the evidence in the light most favorable to the non-moving party, the Court *assumes without deciding* that Fullmer, Pye, and Myers were aware of these alleged complaints.

right adverse to the company. Saville did not initiate a FLSA claim against IBM on his own behalf or on behalf of another employee. Rather, he simply bristled at IBM's directive to reduce overtime.

An employee must "either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as a directed towards the assertion of rights protected by the FLSA." *Id.* at 1486-87. Saville did none of these things. There is no evidence in the record to suggest that Saville was asserting any rights under the FLSA or that he took any action adverse to the company; rather, the record reflects that Saville merely voiced his disagreement with IBM's overtime policy. Saville therefore lacks an essential element of a retaliation claim – he did not take a position adverse to IBM or assert any rights under the FLSA. Accordingly, the Court finds that Saville did not engage in protected activity under § 215(a)(3).

2. Adverse Action

Even assuming that Saville engaged in protected activity, he cannot show that he suffered adverse action by IBM. An adverse employment action is a detrimental change in the terms or conditions of employment, such as termination. *Conner,* 121 F.3d at 1395 & n.4. IBM argues that it did not take adverse action against Saville, but rather, Saville chose to retire from IBM. Saville alleges that he was, in fact, constructively discharged. Constructive discharge "occurs when an employer, through unlawful acts, makes working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Exum v. United States Olympic Committee,* 389

F.3d 1130, 1135 (10th Cir. 2004) (citing *Pennsylvania State Police v. Suders*, ___ U.S. ___, 124 S.Ct. 2342, 2351 (2004) (further citation omitted)). Furthermore, "[w]orking conditions must be so severe that the plaintiff simply had no choice but to quit." *Id.* (citing *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1222 (10th Cir. 2000); *Yearous v. Niobrara County Mem'l Hosp.*, 128 F.3d 1351, 1357) (10th Cir. 1997)). "In contrast, a plaintiff who voluntarily resigns cannot claim that he or she was constructively discharged." *Id.*

The court's inquiry "is not whether working conditions at the facility were difficult or unpleasant." *Id.* (quoting *Yearous*, 128 F.3d at 1357). Rather, Saville must show that, at the time of his resignation, IBM did not offer him the opportunity to make a free choice regarding his employment relationship. *Id.* The Tenth Circuit has previously held that even requiring an employee to choose between resignation and termination is not necessarily a constructive discharge, unless the employee's decision is involuntary. *Id.*

Here, IBM gave Saville a choice of going on a thirty-day performance improvement plan or resigning from IBM with a severance package. Saville alleges that he was constructively discharged because IBM's performance plan was not "bona fide" in that it was only thirty days and he had not received written specifics regarding its terms. The Court disagrees, finding that Saville has failed to provide evidence from which a jury could find that his situation was so intolerable that a reasonable person in his position would have felt compelled to retire.

Indeed, Saville was given an opportunity for improvement – the thirty day performance plan – which he

undisputedly did not take. Saville's contention that the performance improvement plan was not "bona fide" because it was only thirty days and not in writing fails. First, courts have not held that performance improvement plans must be ninety days or any other specific time period. *See Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002); *Seely v. Runyon*, 1998 U.S. App. LEXIS 31311, at *8 (10th Cir. Dec. 14, 1998) (unpublished); *Peecook v. Northwestern Nat'l Ins. Group*, 1998 U.S. App. LEXIS at *11-13 (6th Cir. 1998) (unpublished). Indeed, the shortened thirty day time frame may actually benefit the employee because the employee will only have to be on his or her "best behavior" for thirty days rather than ninety days. Second, the undisputed evidence reflects that Fullmer was prepared to give Saville a written description of the performance improvement plan if Saville accepted that option. The record also reflects that Fullmer told Saville that the plan would address leadership issues, as well as relations with customers, peers, and management. Moreover, neither of these contentions excuses Saville's failure to accept the performance improvement plan as an alternative to resignation.

Saville's own words establish that he voluntarily *chose* to retire from IBM, rather than participate in the thirty day performance plan. On October 30, 1998, Saville sent Fullmer an e-mail stating: "I have made my decision and I guess I am to put 'in writing' my intent to [r]etire to you . . . I will be [r]etiring from IBM after 32 [y]ears and 35 days of [l]oyal [d]edicated [s]ervice on October 31, 1998." Because IBM offered Saville the opportunity to make a free choice regarding his employment relationship, the Court finds that Saville cannot establish constructive discharge.

3. Causal Connection

Even assuming that Saville has satisfied the first two prongs of a prima facie case of retaliation, Saville cannot demonstrate that a causal connection existed between his alleged protected activity and IBM's alleged adverse action. The Tenth Circuit has held that a plaintiff may establish a causal connection "by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Conner,* 121 F.3d at 1395 (citing *Burrus v. United Tel. Co. of Kan., Inc.,* 683 F.2d 339, 343 (10th Cir. 1982) (other citations omitted)). However, if the termination is not very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation. *Id. See also Marx v. Schnuck Markets,* 76 F.3d 324, 329 (10th Cir. 1996) (finding a causal connection where a pattern of retaliatory conduct began against the plaintiff shortly after he filed a FLSA complaint).

In the instant case, Saville alleges that Fullmer, Pye, and Myers were acting in concert with one another and this is sufficient evidence to establish causation. However, Saville has proffered no evidence, other than his own mere speculation, that this occurred. It would be one thing if Saville had evidence of *any* communication between Fullmer, Pye, and Myers – a phone call, an e-mail, a memorandum, another employee's testimony – showing that they were conspiring to discharge him as a result of his alleged overtime complaints. But the record is devoid of any such evidence. Conversely, IBM has proffered the sworn testimony of Fuller and Myers, which contradicts Saville's conspiracy theory. Fullmer testified that she did not learn of Saville's overtime comments in his meeting

with Myers until after she had already decided to place him on a performance improvement plan. This evidence is undisputed. Moreover, Fullmer gave Saville his interim PBC before Saville even allegedly complained to Pye and Myers.

4. Pretext

Even assuming for the sake of argument that Saville has established a prima facie case of retaliation, he cannot satisfy his burden of establishing that IBM's legitimate non-retaliatory reasons for the alleged adverse employment action were pretextual. After a plaintiff has established a prima facie case of retaliation, the burden of production shifts to the employer to offer a legitimate non-retaliatory reason for the adverse employment action. *Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1178 (10th Cir. 1990). The employer need not prove the absence of retaliatory motive; rather, the employer need only produce evidence that would dispel the inference of retaliation. *Conner,* 121 F.3d at 1395.

IBM proffers the following three non-retaliatory reasons for the alleged adverse employment action: (1) Saville was failing to interact positively with customers and peers to ensure customer satisfaction and to mentor the less experienced CEs in his group; (2) Fullmer received reports from peers and customers that Saville's communication style was preventing peers from seeking mentoring and was alienating customers to the point where customers[8] requested that Saville be removed from work on their

[8] IBM claims that both Orem City and Weider Foods asked Fullmer to remove Saville from their accounts. Saville denies any conflicts with these two IBM customers. First, Saville claims that he

(Continued on following page)

accounts; (3) Fullmer believed Saville was inappropriately challenging her authority in group meetings and denigrating her and other IBM management.

Saville argues that IBM's evidence supporting these non-retaliatory reasons is lacking and based largely on hearsay. Despite this broad assertion, Saville concedes that IBM's evidence is sufficient, asserting that he has raised a genuine issue of material fact as to whether such reasons are pretextual. Therefore, the Court finds that IBM has proffered sufficient non-retaliatory reasons.

Because IBM has legitimate non-retaliatory reasons for the alleged adverse employment action, the burden shifts back to Saville to show that these reasons are pretextual. A plaintiff may show pretext by demonstrating "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (1997)). "Mere conjecture

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was replaced on the Orem City account because he did not have the requisite skills to perform the task requested by the customer. This claim is contradicted by Fullmer's testimony as well as Clarke Christensen, an Orem City employee. Christensen testified that Saville was "obnoxious and acted inappropriately," so Orem City complained to IBM and asked that Saville be removed from the account. Regarding Weider Foods, Saville claims that he was removed from their account because they preferred to work with another CE. This statement is contradicted by Fullmer's testimony that Weider Foods asked that Saville be removed from the account because they were not receiving adequate customer support.

that the employer's explanation is pretext is insufficient to defeat summary judgment." *Id.*

Saville proffers three conclusory explanations in response to IBM's non-retaliatory reasons for the alleged adverse employment action: (1) his negative attitude was a product of Fullmer's misperception of his "articulate and forceful" sharing of his concerns; (2) his problems with peers was the result of IBM's job structure; and (3) his problems with customers were the fault of the customers and Fullmer's misinterpretation of customers' complaints. IBM argues that Saville has failed to demonstrate pretext because he has no evidence to show that Fullmer did not honestly and in good faith perceive Saville's performance as needing improvement. The Court agrees with IBM. Indeed, the record is devoid of any evidence that Fullmer's stated reasons for her decision to place Saville on a performance improvement plan were based on anything other than his failure to interact positively with customers, peers, and management.

Rather, the evidence on the record demonstrates that Saville has had difficulty interacting with peers, management, and customers since 1995, long before Saville's passing comments about overtime. Furthermore, this evidence is collaborated by Fullmer's uncontradicted testimony that this was the sole reason that she decided to place Saville on a performance improvement plan. In order to survive summary judgment, Saville can "not rest on his allegations of a conspiracy to get a jury without 'any significant probative evidence tending to support the complaint.'" *Liberty Lobby, Inc.*, 477 U.S. at 248 (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). Despite the conspiracy theory Saville so artfully tries to craft, the Court finds he has

failed to provide sufficient evidence showing IBM's proffered non-retaliatory reasons for the adverse action were pretextual.

CONCLUSION

In *Liberty Lobby,* the Supreme Court carefully announced the basis for summary judgment: the plaintiff "'may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quotation omitted). After viewing the evidence and drawing all reasonable inferences in the light most favorable to Saville, the Court finds that Saville has failed to demonstrate a genuine issue of material fact for trial. Accordingly, the Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED this 23rd of February, 2005.

/s/ Dee Benson
Dee Benson
United States District Judge